

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

JOHN KARPINSKI, CLARK COUNTY NATURAL
RESOURCES COUNCIL and FUTUREWISE,

Petitioners,

v.

CLARK COUNTY,

Respondent,

and

GM CAMAS, LLC.; JOHNSTON DAIRY, et al. and
MACDONALD PROPERTIES; DARYL GERMANN;
CURT GUSTAFSON; T3G, LLC; HINTON
DEVELOPMENT CORPORATION; BUILDING
INDUSTRY ASSOCIATION OF CLARK COUNTY;
CITY OF LA CENTER; AND BIRCHWOOD FARMS,
LLC

Intervenors.

Case No. 07-2-0027

**FINAL DECISION AND
ORDER ON REMAND
[AREAS WB, VA, and VA-2]**

SYNOPSIS

On remand from the Court of Appeals, Division II, the Board reviewed the challenges to Clark County's decision to de-designate three areas of previously designated Agricultural Land of Long Term Commercial Significance (ALLTCS). The Board concludes the Court of Appeals has decided the question of whether Areas VA and VA-2 were characterized by urban growth. As a result, the Board's prior Order finding to the contrary is reversed.

The Court's remand decision also directed the Board to further consider whether Area WB has long-term commercial significance for agricultural production based on the factors set forth in former WAC 365-190-050(1). Pursuant to that analysis, the Board

1 concludes Area WB has long-term commercial significance for agricultural production. The
2 Board's prior Order is affirmed in that regard. Findings and conclusions in the June 3, 2008
3 Amended Final Decision and Order addressing the de-designation decision of Area WB are
4 supplemented as set forth below.

6 I.

7 The Board held a Remand Hearing in Vancouver, Washington on February 4, 2013,
8 attended by members Nina Carter, Margaret Pageler and William Roehl, with Roehl
9 presiding. John Karpinski, Clark County Natural Resources Council and Futurewise
10 (Petitioners) were represented by Tim Trohimovich. Christine M. Cook represented Clark
11 County (County), Randall B. Printz appeared on behalf of Intervenor MacDonald Properties,
12 LeAnne M. Bremer on behalf of Intervenor Birchwood Farms LLC, and James D. Howsley
13 on behalf of Intervenor Holt Homes, Inc.

16 II. PROCEDURAL BACKGROUND

17 This matter returned to the Board following appeals arising from entry of the Board's
18 Final Decision and Order (FDO) and Amended FDO (AFDO) on May 14 and June 3, 2008,
19 respectively. The case began with Petitioners' challenge of Clark County's Ordinance 2007-
20 09-13¹ which de-designated 19 areas of previously designated ALLTCS, consisting of 4,351
21 acres, and added that acreage to the urban growth areas (UGAs) of various Clark County
22 cities.² The de-designation decision occurred less than three years after the adoption of the
23 County's 2004 Growth Management Act (GMA) update which included the designation of
24 those areas as ALLTCS.³ Of the 19 areas, the Board found the decision to de-designate 11
25 of them failed to comply with the GMA as they were not characterized by urban growth.⁴
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31 ¹ Adopted on September 25, 2007.

32 ² Counties may simultaneously review comprehensive plan land use elements and UGA boundaries. RCW 36.70A.130.

³ Adopted September 7, 2004.

⁴ Amended Final Decision and Order, June 3, 2008, p. 3. The original FDO was entered on May 14, 2008, but was amended primarily to correct clerical and grammatical errors.

1 The County's appeal of the Board's decision to the Clark County Superior Court
2 resulted in a ruling which affirmed the Board in part and reversed it in part.⁵ The parties then
3 appealed in turn to the Court of Appeals, Division II.⁶ The Court of Appeals remanded three
4 of the eleven areas⁷ found non-compliant by the Board and affirmed the Board as to the
5 others. Ultimately, the Washington Supreme Court granted review in part, considering only
6 an issue involving the Court of Appeals' consideration of the validity of cities' decisions to
7 annex lands while a challenge was pending before the Board.⁸ The Supreme Court's action
8 was to vacate a portion of the Court of Appeals decision, a portion which has no bearing on
9 the issues before the Board pursuant to the remand order.⁹

11 The end result of the appellate process was the remand of a limited number of
12 issues. Most recently, the Clark County Superior Court entered an order remanding the
13 matter to the Board.¹⁰

15 III. JURISDICTION, STANDARD OF REVIEW, 16 AND SCOPE OF REMAND

17 Jurisdiction

18 The Board found in its FDOs that it had jurisdiction in these proceedings¹¹ and no
19 issue has been raised challenging that finding.

21 Standard of Review

22 In *Swinomish Indian Tribal Community v. W. Wash. Growth Mgmt. Hearings Bd.*,¹²
23 the Supreme Court summarized the Board's standard of review:

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27 ⁵ Clark County Superior Court Cause No. 08-2-03625-5.

28 ⁶ *Clark County v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn. App. 204, 254 P.3d 862 (2011).

29 ⁷ The appeal of the Board's decision challenged only 11 of the 19 de-designated areas.

30 ⁸ *Clark County v. W. Wash. Growth Mgmt. Hearings Bd.*, 177 Wn.2d 136, 298 P.3d 704 (2013).

31 ⁹ *Id.* at 148: "We vacate the Court of Appeals' opinion insofar as it relates to the Annexed Lands [Camas Areas
32 CB and CA-1 as well as Ridgefield RB-2]. All claims related to the Annexed Lands were resolved below, were
not raised on appeal, remained separate and distinct from the claims and issues actually raised on appeal,
and should not have been addressed."

¹⁰ Clark County Superior Court Cause No. 08-2-03625-5, Agreed Order Remanding the Case to the Growth
Management Hearings Board, dated July 29, 2013.

¹¹ Conclusion of Law A, AFDO at p. 77.

¹² 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007) (internal case citations omitted).

1 The Board “shall find compliance unless it determines that the action by the
2 [county] is clearly erroneous in view of the entire record before the board and
3 in light of the goals and requirements of [the GMA].” RCW 36.70A.320(3). An
4 action is “clearly erroneous” if the Board is “left with the firm and definite
5 conviction that a mistake has been committed.” “Comprehensive plans and
6 development regulations [under the GMA] are presumed valid upon
7 adoption.” RCW 36.70A.320(1). Although RCW 36.70A.3201 requires the
8 Board to give deference to a [jurisdiction], the [jurisdiction’s] actions must be
9 consistent with the goals and requirements of the GMA.

10 As to the degree of deference to be granted under the clearly erroneous standard,
11 the *Swinomish* Court stated:¹³

12 The amount [of deference] is neither unlimited nor does it approximate a
13 rubber stamp. It requires the Board to give the [county’s] actions a “critical
14 review” and is a “more intense standard of review” than the arbitrary and
15 capricious standard.

16 The Court of Appeals in *Suquamish Tribe v. Central Puget Sound Growth
17 Management Hearings Board*, observed:¹⁴

18 The GMA affords broad discretion to local governments in planning for
19 growth, bounded only by the GMA’s goals and requirements.¹⁵ Boards must
20 afford a county’s actions great deference so long as the action complies with
21 the GMA and is not clearly erroneous. . . .¹⁶ A board must presume that a
22 county’s action is valid, leaving the challenger to meet the burden of
23 establishing invalidity.¹⁷

24 The Board took note of the following observation included in the Court of Appeals
25 decision remanding this matter and shares the concerns expressed:

26 The County’s contention that the Growth Board is required to give its 2007
27 de-designation deference over its 2004 designation is unpersuasive. The
28 County designated these parcels as ALLTCS in its 2004 comprehensive
29 plan, which it intended to follow for 20 years. Absent a showing that this
30 designation was both erroneous in 2004 and improperly confirmed by the

31 ¹³ *Id.* at 435, n. 8 (internal citations omitted).

32 ¹⁴ 156 Wn.App. 743, 759, 235 P.3d 812 (2010).

¹⁵ *Id.*, citing *King County v. CPSGMHB*, 142 Wn.2d 543, 561, 14 P.3d 133 (2000) and *Thurston County v. Cooper Point Ass’n*, 148 Wn. 2d 1, 13-15, 57 P.3d 1156 (2002).

¹⁶ *Id.* at 760, citing RCW 36.70A.320(2), and *Lewis County v. WWGMHB*, 157 Wn.2d 488, 497, 139 P.3 1096 (2006).

¹⁷ *Id.* citing RCW 36.70A.302(2) and *City of Redmond v. CPSGMHB*, 116 Wn.App. 48, 55, 65 P.3d 337 (2003).

1 Growth Board, or that a substantial change in the land occurred since the
2 ALLTCS designation, the prior designation should remain. Without such
3 deference to the original designation, there is no land use plan, merely a
4 series of quixotic regulations. Moreover, under such ever-changing
5 regulations, the GMA goal of planning, maintaining, and conserving
6 agricultural lands could never be achieved.¹⁸

7 That comment was followed by a footnote suggesting legislative guidance in that
8 regard might be appropriate.¹⁹ Notwithstanding the Court's observation regarding deference
9 to a prior but recent ALLTCS designation decision, the Court's reference to legislative
10 clarification leads the Board to conclude that the presumption of validity and deference to
11 County action in the 2007 de-designation decision, as well as placement of the burden of
12 proof on the Petitioners, is applicable to this remand proceeding.

13 Holt Homes argues the Board is required to defer to the County's de-designation
14 decision. It argues the Board, in its initial decision, improperly found the County's de-
15 designation decision noncompliant ". . . based on its own independent analysis."²⁰ "The
16 GMHB cannot substitute its own judgment of the facts against the WAC factors; rather, the
17 GMHB must give deference to the County."²¹ Holt argues the Board of County
18 Commissioners (BOCC) is the finder of fact and not the Board although Holt acknowledges
19 the Board may substitute its judgment if it concludes the action was clearly erroneous. It
20 then contends both the Superior Court and the Court of Appeals "considered the evidence"
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25 ¹⁸ *Clark County v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn. App. 204 at 234.

26 ¹⁹ We note that even though a county's comprehensive plan amendments are presumed valid upon adoption,
27 under RCW 36.70A.320(1), a county's previous determinations and designations of land are still relevant to the
28 analysis. A significant goal of the GMA is to identify, *maintain*, enhance, and *conserve* agricultural lands. See
29 RCW 36.70A.020(8); *Soccer Fields*, 142 Wn.2d at 558. This goal suggests there is relevance of a county's
30 previous designation of land as ALLTCS because otherwise there would be no way for a county to maintain
31 and conserve these lands over time. But under the GMA it is unclear, and the legislature may want to consider
32 and provide direction on, what weight a county should give to prior agricultural designations during subsequent
comprehensive plan reviews. Based on the goals of maintaining and conserving agricultural lands, it appears
the proper weight is deference to the original designation. See RCW 36.70A.020(8); *Soccer Fields*, 142 Wn.2d
at 558; see *Yakima County v. E. Wash. Growth Mgmt. Hearings Bd.*, 146 Wn. App. 679, 688-89, 192 P.3d 12
(2008).²⁰ 161 Wn. App. 204 at 234, n. 21.

²⁰ Intervenor Holt Homes, Inc.'s Hearing Brief at 5, 6.

²¹ *Id.* at 5.

1 and concluded Area VA was “characterized by urban growth,” that no commercial
2 agricultural lands [are] within the area; and that the infrastructure is available.”²²

3 The County echoes some of Holt’s argument with the statement that “[t]he Board
4 should defer to the County’s planning decisions that VA and VA-2 were appropriate
5 additions when looking at the Vancouver UGA as a whole. That decision belonged to the
6 County and is not for the petitioners or the Board to reweigh.”²³

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8 The Board is fully cognizant of the directive set out in RCW 36.70A.320(3) whereby
9 the Board must find a jurisdiction’s actions compliant absent a showing such action was
10 clearly erroneous. The Board also appreciates it is not the trier of fact. Having said that, the
11 Board also understands jurisdictions’ actions must be in “compliance with the requirements
12 of [the GMA]”.²⁴

13 However, the Board rejects any implication it is limited to considering only such
14 evidence as may support a jurisdiction’s decision. To the contrary, the Board is required to
15 reach a decision “in view of the entire record before the board and in light of the goals and
16 requirements of this chapter.” RCW 36.70A.320(3).

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18 The Supreme Court recently clarified its *Arlington*²⁵ decision in *Kittitas County v. E.*
19 *Wash. Growth Mgmt. Hearings Bd.*²⁶ when it stated:

20 Petitioners argue that, under *City of Arlington*, the mere presence of
21 evidence supporting a county decision as comports with the GMA entitles
22 that county to board deference. While the issue of proper deference
23 pervades each question, Petitioners’ argument and the significance of proper
24 deference to our standard of review in GMA cases compel us to clarify the
25 rule at the outset.

26 In *City of Arlington*, this court held that boards must consider anecdotal
27 evidence and where, **within the constraints of the GMA**, more than one
28 appropriate planning choice exists, boards must defer to a county’s
29 discretion. 164 Wn.2d at 788. Petitioners, however, take the rule in *City of*
30 *Arlington* to the extreme point of eliminating any evaluative role for boards.

31 ²² *Id.* at 6.

32 ²³ Clark County’s Brief on Remand at 4.

²⁴ RCW 36.70A.320.

²⁵ *City of Arlington v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 164 Wn.2d 768, 193 P.3d 1077 (2008).

²⁶ 172 Wn.2d 144, 155, 256 P.3d 1193 (2011).

1 The legislature granted authority to three boards to adjudicate issues of GMA
2 compliance. Former RCW 36.70A.250 (1994), .280(1)(a) (2003). While
3 county actions are presumed compliant unless and until a petitioner brings
4 forth evidence that persuades a board that the action is clearly erroneous,
5 RCW 36.70A.320(3), deference to counties remains “bounded . . . by the
6 goals and requirements of the GMA,” *King County*, 142 Wn.2d at 561. The
7 deference boards must give “is neither unlimited nor does it approximate a
8 rubber stamp.” *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt.*
Hearings Bd., 161 Wn.2d 415, 435, n. 8, 166 P.3d 1198 (2007). (Emphasis
added).

9 The Board did not improperly disregard evidence presented by the County. The
10 Board was required to review all evidence supporting the County's decisions, which it did.

11 Counties may not cite to *any* fact or opinion and then call for absolute
12 deference. Boards must be able to look to evidence and at least evaluate its
13 relevance. To clarify, *City of Arlington* stands for the fact that boards must
14 consider anecdotal evidence provided by counties and defer to local planning
15 decisions as between different planning choices that are compliant with the
16 GMA. **It does not mean that counties may point to any evidence and
demand unbounded deference** (emphasis added).²⁷

17 Division III of the Court of Appeals commented on the *Kittitas* decision in its *Yakima*
18 *County v. E. Wash. Growth Mgmt. Hearings Bd.* opinion:²⁸

19 In *Kittitas County* the court addressed the extent to which a growth board
20 must defer to the counties' local planning processes. The petitioners in
21 *Kittitas County* argued that “the mere presence of evidence supporting a
22 county decision as comporting with the GMA entitles that county to board
23 deference.” Finding this extreme stance would eliminate a growth board's
24 evaluative role, the court concluded growth boards must consider anecdotal
25 evidence provided by counties and **defer to the counties' discretion when,
within the constraints of the GMA, more than one appropriate planning
26 choice exists** (citations omitted, emphasis added).²⁹

27 Clark County raised similar objections in its appeal of this matter, arguing the Board
28 had “exceeded its authority by reevaluating all the evidence in the record.”³⁰ The Court
29 rejected that argument, referencing RCW 36.70A.320(3) and stated: “The County has not
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32 ²⁷ *Kittitas County* at 157.

²⁸ *Yakima County v. E. Wash. Growth Mgmt. Hearings Bd.*, 168 Wn. App. 680, 279 P.3d 434 (2012).

²⁹ *Id.* at 691.

³⁰ *Clark County v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn. App. 204 at 235.

1 persuaded us that the Growth Board committed an error of law by exceeding its authority in
2 its review of the County's de-designation decisions.”³¹

3 While granting Clark County the deference to which it is entitled by the GMA, the
4 Board will consider the “entire record before the Board” “in light of the goals and
5 requirements of the [GMA].”
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7 **Scope of Remand**

8 The issues before the Board pursuant to the remand involve three areas de-
9 designated with the adoption of Ordinance 2007-09-13 and added to the urban growth
10 areas of Vancouver and Washougal. Those areas have been referred to throughout these
11 proceedings as Vancouver VA, Vancouver VA-2³² and Washougal WB. The Board framed
12 the remand issues as set forth below.³³
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15 Issue: In the adoption of Ordinance 2007-09-13 as it applies to those areas
16 identified as Vancouver VA, Vancouver VA-2 and Washougal WB:

- 17 a. Did Clark County violate RCW 36.70A.020(8), 36.70A.050(3), 36.70A.070, (1),
18 (3), and 36.70A.170(1) & (2) in Ordinance No. 2007-09-13 by de-designating
19 agricultural land in violation of RCW 36.70A.170, in violation of RCW
20 36.70A.050(3) and WAC 365-190-050, and in violation of the County’s own
21 criteria for designating agricultural land contained within the comprehensive
22 plan and the GMA’s requirements for internal consistency in RCW
23 36.70A.070?
- 24 b. Did Clark County violate RCW 36.70A.020 (1-2, 8-10, 12), 36.70A.060,
25 36.70A.110(1) & (3) in Ordinance No. 2007-09-13 by including land within
26 Urban Growth Areas that is not characterized by urban growth, should be
27 designated as agricultural land, and is adjacent to agricultural land?
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31 ³¹ *Id.*

32 ³² Maps included in Ex. 6605 incorrectly referred to this area as VA-1.

³³ Order Setting Briefing and Hearing Schedule on Remand, September 19, 2013, p. 3. No objection to the completeness or accuracy of the issue statements was raised by any party. See WAC 242-03-545. That fact was confirmed by all counsel at the commencement of the remand hearing.

IV. DISCUSSION

Agricultural Lands

One of the primary goals of the Growth Management Act is the maintenance of agricultural lands and the agricultural industry. RCW 36.70A.020(8) is the natural resource industries goal:

Maintain and enhance natural resource-based industries, including . . . agricultural . . . industries. Encourage the conservation of productive . . . agricultural lands, and discourage incompatible uses. (emphasis added)

Those counties initially required to comply with the GMA were mandated to designate agricultural lands on or before September 1, 1991.³⁴ That designation requirement preceded the directive to adopt comprehensive plans and establish urban growth areas. "The significance of agricultural land preservation in the GMA can be seen in the very timing of key actions mandated in the statute."³⁵

The Supreme Court stated in *City of Redmond*:

Natural resource lands are protected not for the sake of their ecological role but to ensure the viability of the resource-based industries that depend on them. Allowing conversion of resource lands to other uses by allowing incompatible uses nearby impairs the viability of the resource industry.³⁶

The definition of agricultural land is found at RCW 36.70A.030(2):

"Agricultural land" means land primarily devoted to the commercial production of horticultural, viticultural, floricultural, dairy, apiary, vegetable, or animal products or of berries, grain, hay, straw, turf, seed, Christmas trees . . . finfish in upland hatcheries, or livestock, and that has long-term commercial significance for agricultural production.

"Long-term commercial significance" is then defined by RCW 36.70A.030(10):

"Long-term commercial significance " includes the growing capacity, productivity, and soil composition of the land for long-term commercial

³⁴ RCW 36.70A.170(1)(a).

³⁵ *City of Redmond v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 959 P.2d 1091 (1998).

³⁶ *City of Redmond*, 116 Wn. App. 48 at 47, quoting Richard L. Settle and Charles G. Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future*, 16 U. Puget Sound L. Review 1141, 1145 (1993).

1 production, in consideration with the land's proximity to population areas, and
2 the possibility of more intense uses of the land.

3 The *City of Redmond* court specifically addressed the "devoted to" language used in
4 RCW 36.70A.030(2):

5 We hold land is "devoted to" agricultural use under RCW 36.70A.030 if it is in
6 an area where the land is actually used or capable of being used for
7 agricultural production. . . . While the land use on the particular parcel and
8 the owner's intended use for the land may be considered along with other
9 factors in the determination of whether a parcel is in an area primarily
10 devoted to commercial agricultural production, neither current use nor
11 landowner intent of a particular parcel is conclusive for purposes of this
12 element of the statutory definition.³⁷

13 Once agricultural lands have been designated under RCW 36.70A.170, RCW
14 36.70A. 060(1) directed counties to adopt development regulations to "assure the
15 conservation of agricultural lands." Notwithstanding the mandate to designate and conserve
16 agricultural lands, the courts and the boards have concluded the GMA does not require that
17 such lands remain designated in perpetuity. The Act, however, fails to delineate how a
18 county should determine that designated agriculture lands should be de-designated. In its
19 decision remanding this matter to the Board, the Court of Appeals set forth the "three
20 prongs that must be satisfied for land to be de-designated as ALLTCS,"³⁸ citing the
21 Washington Supreme Court in *Lewis County v. Western Wash. Growth Mgmt. Hearings*
22 *Board*.³⁹ Those "prongs," as restated by the Court of Appeals, are:

- 23
24 1. A determination of whether the land is characterized by "urban growth;"

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27 ³⁷ *City of Redmond*, 136 Wn.2d at 53.

28 ³⁸ Three prongs must be satisfied to designate such lands; to de-designate, one would presume the failure to
29 meet any one of the prongs would justify de-designation. A decision to de-designate ALLTCS requires
30 consideration of the same criteria applicable to designation: "We evaluate whether a de-designation of
31 agricultural land was clearly erroneous by determining whether the property in question continues to meet the
32 GMA definition of 'agricultural land' as defined in *Lewis County*." *Clark County v. W. Wash. Growth Mgmt.*
Hearings Bd., 161 Wn. App. at 234 (2011); *See also Kittitas County Conservation v. Kittitas County*, Case No.
07-1-0004c, Compliance Order at 17 (Feb. 4, 2009); *Kittitas Conservation v. Kittitas County*, Case No. 07-1-
0004c, FDO, at 33 (Aug. 20, 2007); *CCNRC v. Clark County*, Case No. 09-2-0002, FDO at 23 (Aug. 10, 2009);
Orton Farms v. Pierce County, Case No. 04-3-0007c, FDO, at 37 (July 9, 2012).

³⁹ 157 Wn.2d 488 (2006).

- 1 2. A determination of the commercial productivity of the land or the land's
2 capability of being commercially productive.⁴⁰ (The Court observed that
3 "[t]his factor requires an assessment of whether "the land is actually
4 used or capable of being used for agricultural production," citing *City of*
5 *Redmond*⁴¹);⁴²
6
7 3. A determination of the "long-term commercial significance" for
8 agricultural production of the parcels. The Court stated this
9 determination requires consideration of soil composition, proximity to
10 population areas, the possibility of more intense uses of the land, and
11 the 10 factors in former WAC 365-190-050(1).⁴³

12 WASHOUGAL WB

13 That portion of the Court of Appeals' decision remanding area WB to the Board found
14 fault in the Board's failure to document its consideration of all of the WAC factors required to
15 be addressed under the *Lewis County* third prong: whether the land has "long-term
16 commercial significance" for agricultural production.⁴⁴ This prong requires consideration of
17 soil composition, proximity to population areas, the possibility of more intense uses of the
18 land, and the 10 factors in former WAC 365-190-050(1). *Lewis County*, 157 Wn.2d at 502.

19 But the record does not show that the Growth Board considered all of the
20 WAC factors. Accordingly, we remand to the Growth Board its decision on
21 parcel WB for further consideration.⁴⁵

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24 ⁴⁰ Both *City of Redmond*, 136 Wn.2d at 53, and *Lewis County*, 157 Wn.2d at 502, specifically held land was
25 "devoted to" agricultural use under RCW 36.70A.030 if it is in an area where the land is actually used or
26 capable of being used for agricultural production. However, the Court of Appeals in its remand decision, after
27 first quoting *Lewis County*'s second prong at p. 231, then restated the prong to exclude consideration of the
28 area within which the land is located, focusing solely on the land itself: "The second *Lewis County* prong
29 requires a determination of the commercial productivity of the land or the land's capability of being
30 commercially productive." 161 Wn. App. at 240.

31 ⁴¹ 136 Wn.2d at 53 (1998).

32 ⁴² *Clark County v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn. App. at 241 (2011).

⁴³ *Id.* at 242.

⁴⁴ In regards to the Supreme Court's use of the word "may" in *Lewis County* in reference to the WAC 365-190-050 factors, the Court of Appeals decision remanding this matter to the Board stated: "Despite our Supreme Court's permissive language suggesting that counties 'may' consider the development-related factors enumerated in [former] WAC 365-190-050(1),' (citation omitted), when addressing the third prong of the *Lewis County* test to determine if land has long-term significance for agricultural production, the regulation actually requires counties to consider the 10 factors." 161 Wn. App. at 232 (emphasis added).

⁴⁵ *Clark County v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn. App. at 248.

1 Our review of the Growth Board's analysis of the WB parcel reveals that the
2 Growth Board failed to make an adequate record of its consideration of most
3 of the WAC factors. The Growth Board's analysis and finding of fact 40,⁴⁶ the
4 only formal finding specific to parcel WB, discusses soil characteristics, tax
5 base expansion benefits, and adjacency of the parcel to the existing UGA.
6 But the record does not show that the Growth Board considered all the WAC
7 factors in its review such that it could have had a "firm and definite
8 conviction" that the County made a mistake in its de-designation decision
9 insofar as the County made its decision based on the third *Lewis County* test
10 prong.⁴⁷

11 Reconsideration of the de-designation of Area WB therefore requires the Board to
12 review the proposal in light of WAC 365-190-050,⁴⁸ the "minimum guidelines" for
13 designating agricultural lands.⁴⁹

14 WAC 365-190-050 in effect at the time of the County's de-designation decision
15 included the following factors to be considered:

- 16 (1) In classifying agricultural lands of long-term significance for the
17 production of food or other agricultural products, counties and cities shall use
18 the land-capability classification system of the United States Department of
19 Agriculture Soil Conservation Service as defined in Agriculture Handbook No.
20 210. These eight classes are incorporated by the United States Department
21 of Agriculture into map units described in published soil surveys. These
22 categories incorporate consideration of the growing capacity, productivity and
23 soil composition of the land. Counties and cities shall also consider the
24 combined effects of proximity to population areas and the possibility of more
25 intense uses of the land as indicated by:
26 (a) The availability of public facilities;
27 (b) Tax status;
28 (c) The availability of public services;
29 (d) Relationship or proximity to urban growth areas;
30 (e) Predominant parcel size;
31 (f) Land use settlement patterns and their compatibility with agricultural
32 practices;

⁴⁶ Finding of Fact 40: "In Area WB, the County's Matrix describes the land as having 82% prime agricultural soils. Most soils appear to be Class I and II. The Matrix also says that it is to be brought into the area to provide tax base for the Battle Ground School District. The area is not adjacent to the UGA and no permits for development are nearby."

⁴⁷ *Clark County v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn. App. at 248.

⁴⁸ WAC 365-190-050 was amended effective 12/3/10. The Board applies the rule in effect in 2007.

⁴⁹ The Board, and the courts as shown by the remand decision, has found the same rules apply to de-designation as apply to designation.

- (g) Intensity of nearby land uses;
(h) History of land development permits issued nearby;
(i) Land values under alternative uses; and
(j) Proximity of markets.

The Board will consider each of those factors in turn.

Growing Capacity, Productivity, Soil Composition

The Matrix prepared by Clark County staff indicates 82% of Area WB is made up of prime soils, and that approximately 6% of the area is critical areas.⁵⁰ The prime soils include 80% Hesson clay loam (0 to 8% slope) (HcB), capability class II, while 10% is Hesson clay loam (20 to 30% slope) (HcD), capability class III.⁵¹ The remainder, all sloped forested land, is capability class IV (HcE) which is similar to HcB with the difference being a thinner soil layer.⁵²

Intervenor MacDonald Properties argues the fact Area WB lacks a water right supports the conclusion the Area is not of long-term commercial significance. However, as noted by the Petitioners, such a lack is taken into account by the USDA in classifying soils.⁵³ HcB soil, which makes up 80% of Area WB, is classified as Clark County prime farmland by the USDA's Natural Resource Conservation Service.⁵⁴ In addition, a significant percentage of Clark County's farms were not irrigated as recently as 2002.⁵⁵ The County's decision appears to have been based, in part, on the opinion of one Commissioner that a lack of a

⁵⁰ Ex. 6605, Attachment A, p. 7. Ex. 6605 is entitled *July 5 and August 14, 2007 BOCC Tentative Land Use Map Agricultural Analysis Deliberation and Decision*. This document, referred to as the Matrix, included information and analysis of the statutory and regulatory factors for determining whether land qualifies as ALLTCS and applied those factors to each of the 19 parcels the County considered for de-designation.

⁵¹ Ex. 5837, p. 4.

⁵² *Id.*

⁵³ Prime farmlands have the ". . . soil quality, growing season, and moisture supply needed to economically produce sustained high yields of crops . . . Prime farmlands have an adequate and dependable water supply from precipitation or irrigation. . . ." (emphasis supplied) 7 CFR 657.5 (a) (1).

⁵⁴ Ex. 6634B, p. 1.

⁵⁵ Ex. 6634A, *Washington State and County Data Volume 1, Geographic Area Series • Part 47, Chapter 2: County Level Data, Table 10. Irrigation: 2002 and 1997* p. 253 (June 2004); Ex. 6548, Clark County Community Planning Report, May 21, 2007, p. 29, noted in 2002 there were 70,694 acres of Clark County land in farms and that only 4,752 acres were irrigated.

1 water right rendered the soils less than prime,⁵⁶ notwithstanding the fact the NRCS prime
2 soil classification system takes water into consideration. That opinion echoes the Court of
3 Appeals observation in regards the same argument related to La Center's de-designated
4 areas.⁵⁷

6 **WAC Factors**

7 **a. The availability of public facilities:**

8 Public facilities are defined by RCW 36.70A.030(12) [and WAC 365-190-030(16)] as
9 including streets, roads, highways, sidewalks, street and road lighting systems, traffic
10 signals, domestic water systems, storm and sanitary sewer systems, parks and recreational
11 facilities, and schools. Area WB has no water or sewer lines and the maps fail to show any
12 in the vicinity.⁵⁸ The record establishes sewer and water service as well as storm water
13 facilities are one to two miles from Area WB, although they would be available by extension
14 from the Washougal city limits.⁵⁹ There are no structures in Area WB.⁶⁰ There is no
15 evidence in the Record of other public facilities with the exception of the roads bordering
16 portions of the area.
17

19 **b. Tax status:**

20 The entire area (116 acres), consisting of two parcels, is assessed and taxed at
21 agricultural/farm current use under chapter 84.34 RCW.⁶¹ Some agricultural production is
22
23

24 ⁵⁶ Ex. 6606, p. 42: ". . . and as I said before I think them [sic] are only prime ag if you could ever get water up
25 there and you can't for ag so I would pretty well bring that out for any long-term viability of farming and. . . ."

26 ⁵⁷ *Clark County v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn. App. at 241, n. 26: "It appears that the
27 County relied on an individual county commissioner's belief in the difficulties in obtaining water rights or
28 accessing water for farming on these parcels. We could not find anything in the record to support the
29 commissioner's opinion that it would be hard to get water and/or water rights to these parcels. The county
30 commissioner merely states this belief, which in and of itself does not constitute substantial evidence
31 supporting the County's decision."

32 ⁵⁸ Ex. 5837, p. 8: "Sanitary sewer, storm water, and potable water lines would be constructed and connected
to existing services which are available within the city boundary of Washougal."

⁵⁹ Ex. 5837, p. 8.

⁶⁰ Ex. 6606, p. 39, lines 2-3.

⁶¹ Ex. 6605, p. 7; Ex. 5837, p. 3; The legislative declaration included in Chapter 84.34 RCW states: "The
legislature hereby declares that it is in the best interest of the state to maintain, preserve, conserve and
otherwise continue in existence adequate open space lands for the production of food, fiber and forest crops,
and to assure the use and enjoyment of natural resources and scenic beauty for the economic and social well-

1 required to qualify and remain in the current use “farm/ag” taxation program of chapter
2 84.34 RCW. See RCW 84.34.020(2).

3
4 **c. The availability of public services:**

5 Public services are defined by RCW 36.70A.030(13) [and WAC 365-190-030(17)] as
6 including fire protection and suppression, law enforcement, public health, education,
7 recreation, environmental protection, and other governmental services. There are no public
8 facilities or services set forth on the Matrix
9

10 **d. Relation or proximity to urban growth areas:**

11 Area WB lies either one-quarter or one-half mile to the North and East of
12 Washougal’s 2004 UGA boundary⁶² and between one to two miles from the Washougal city
13 limits.⁶³ If merely being within one-quarter mile of a UGA boundary justifies de-designation
14 of ALLTCS, there is nothing to prevent the inexorable loss of fertile farmland. This
15 expansion of the UGA followed by its urbanization will lead to the identical argument being
16 made to justify further expansion as the nearby ALLTCS land will then be found to be
17 adjacent or in proximity to urban growth.⁶⁴ As the Court of Appeals stated: “Under the GMA,
18 the ‘logical place’ for expansion and growth is to build higher within the UGA, not to expand
19 it.”⁶⁵
20
21

22 **e. Predominant parcel size:**

23 The two parcels in Area WB, one of 37 acres and the other of 79 acres, are in single
24 ownership, an average of 58 acres.⁶⁶ Clark County’s farms averaged 44 acres in 2002.⁶⁷
25
26
27

28 being of the state and its citizens. The legislature further declares that assessment practices must be so
29 designed as to permit the continued availability of open space lands for these purposes, and it is the intent of
30 this chapter so to provide. The legislature further declares its intent that farm and agricultural lands shall be
31 valued on the basis of their value for use as authorized by section 11 of Article VII of the Constitution of the
32 state of Washington.”

⁶² Ex. 5837, pp. 3 and 8.

⁶³ *Id.*, p. 8.

⁶⁴ *Friends of Pierce County v. Pierce County*, GMHB Case No. 12-3-0002c, FDO p. 51(July 9, 2012).

⁶⁵ 161 Wn. App. at 244.

⁶⁶ Ex. 6605, p. 7; Ex. 5837, p. 2.

1 **f. Land use settlement patterns and compatibility with agricultural practices:**

2 The Matrix indicates the two parcels include no structures, open fields and a portion
3 of forested land while the surrounding land includes open fields, forested land and rural
4 residential.⁶⁸ Properties nearby include a mix of rural residences with some properties
5 having tracts of hay and pasture, and some cattle/horse grazing.⁶⁹ A larger parcel abutting
6 the southwest border of Area WB is in hay production or pasture grazing. Two small
7 parcels to the North are devoted to Christmas trees and rural residential use.⁷⁰ There are
8 two parcels of 20 and 40 acres adjoining WB which are in timber/forestry. Six smaller
9 properties are devoted to residential use and are between two and one-half and five
10 acres.⁷¹ Some properties to the West, Northeast and South are in agricultural zoning
11 although other parcels to the North, West and East are zoned Rural.⁷²

12
13
14 **g. Intensity of nearby land uses:**

15 The surrounding area is essentially undeveloped and rural in nature: "open fields,
16 forested land and rural residential."⁷³ Aerial photographs in the record are illustrative of the
17 character of the area.⁷⁴

18
19
20 **h. History of land development permits issued nearby:**

21 There has been no urban development in the area according to Clark County staff
22 analysis: "No urban development permits within the vicinity."⁷⁵

23
24 **i. Land values under alternative uses:**

25 Land values would clearly be higher if taken out of agriculture, rezoned, and added to
26 the Washougal UGA.⁷⁶ The County envisioned the WB area being developed as an
27

28 ⁶⁷ Ex. 6634, *2002 Census of Agriculture, Washington State and County Data*, Volume 1, Geographic Area
29 Series, Part 47 (June, 2004), p. 238.

30 ⁶⁸ Ex. 6605, p. 7.

31 ⁶⁹ Ex. 5837, p. 3.

32 ⁷⁰ *Id.*

⁷¹ *Id.* at 4.

⁷² *Id.*

⁷³ Ex. 6605, p. 7.

⁷⁴ Ex. 6634A includes two such photographs.

⁷⁵ Ex. 6605, Attachment A, p. 7.

1 “Employment Center/Business Park.”⁷⁷ The Board has previously noted the mere potential
2 for de-designation may drive up land values. As the Amici Farm Organizations⁷⁸ observed
3 in a recent Pierce County Growth Management Hearings Board decision:

4 *Amici* acknowledge zoning controls are not a *sufficient* guarantee that land
5 will remain available for farming, but land use designations and the political
6 will to enforce them are certainly a *necessary* condition for the industry’s
7 stability. *Amici* point out it is the “*flexibility* of zoning laws” that inflates land
8 values and destabilizes the farm industry. *Amici* argue the Orton Junction
9 de-designation of ARL and RF lands not only paves over 182 acres of prime
10 farm lands but sends a signal to other farmers that zoning will not long
11 protect them from urbanization, particularly if mere urban adjacency
12 becomes the overriding factor in the de-designation analysis.⁷⁹

13 **j. Proximity to markets:**

14 One of the aims of the GMA is to “preserve agricultural land near our urban centers
15 so that freshly grown food would be readily available to urban residents and the next
16 generation could see food production and be disabused of the notion that food grows on
17 supermarket shelves.”⁸⁰ In this matter, the nearest town is Washougal, which is between
18 one and two miles distant. Additionally, the major metropolitan markets of Vancouver and
19 Portland are nearby.

20 Based on the discussion and findings above, the Board finds and concludes Area
21 WB has long-term commercial significance for agricultural production, the *Lewis County*
22 third prong. The Board’s conclusion is based on consideration of the soil, growing capacity,
23 and productivity, together with consideration of the factors set out in WAC 365-190-050(1).
24 Eighty-two percent of Area WB is prime farmland. It therefore has the “soil quality, growing
25 season, and moisture supply needed to economically produce sustained high yields of
26
27

28
29 ⁷⁶ See the *City of Redmond* decision where the Court observed: “Presumably, in the case of agricultural land,
30 it will always be financially more lucrative to develop such land for uses more intense than agriculture.” *City of*
31 *Redmond v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d at 52.

32 ⁷⁷ Ex. 6605, Attachment A, p. 7

⁷⁸ Washington Sustainable Food and Farming Network, Cascade Harvest Coalition, Organically Grown
Company, Tilth Producers, Terra Organics, Tahoma Farms, Let Us Farm, Washington State Farmers Market
Association, and Charlie’s Produce.

⁷⁹ *Friends of Pierce County v. Pierce County*, GMHB Case No. 12-3-0002c, FDO, p. 54 (July 9, 2012).

⁸⁰ *City of Redmond*, 136 Wn.2d at 58.

1 crops.” In considering the WAC 365-190-050(1) factors, the Board finds and concludes:
2 Area WB lacks public facilities and services with the exception of being adjacent to a rural
3 road, it is not located near an existing UGA, it is comprised of two large parcels, there is no
4 evidence of incompatibility with agricultural practices, nearby uses are of low intensity, no
5 land development has taken place in the area, and it is in close proximity to markets for
6 agricultural products. The fact land values would be higher if the Area was de-designated is
7 the only factor supporting de-designation.
8

9 Beyond the considerations referenced above, the Board notes the County’s focus on
10 economic opportunities in regards to Area WB as reflected in the BOCC [Board of County
11 Commissioners] Deliberation/Decision column of the Matrix, the Final Environmental Impact
12 Statement, Volume II, as well as a staff report:

13 The low percentage of critical land and high percentage of prime ag soils
14 only provide good farm land when there is access to water. There is no
15 access to water in this sub area.⁸¹

16 The area would serve a higher purpose if converted to employment land
17 which would increase the tax base for the City. It would also benefit the
18 School District to assist in providing a better education for the children in the
19 Washougal School District.

20 It was determined that this area be de-designated from agricultural use and
21 brought into the UGB [urban growth boundary] as Employment
22 Center/Business Park.⁸²

23 The Washougal UGA would expand to the northwest and northeast corners
24 of the existing UGA and city limits for a mix of residential low-density,
25 medium density, and high density uses. A large area of employment
26 center/business park would be added east of SE Lawton and SE Jennings
27 road.⁸³
28
29
30

31 ⁸¹ While the comment regarding a lack of irrigation water appears to be accurate, the observation that the Area
32 would only be good farmland dependent on access to water appears to be false. See the discussion above
regarding Soils.

⁸² Ex. 6605, p. 7.

⁸³ Ex. 2812-2813, p. 21.

1 It was determined that both these sub-areas **would serve a higher purpose**
2 as employment land, which would create more jobs, increase the tax base for
3 the City and the benefit the School District⁸⁴ (emphasis added).

4 Elevating economic factors in regards to Area WB above the GMA goal to maintain
5 and enhance agricultural lands and the agricultural industry reflects the same failing the
6 Court of Appeals noted in discussing the La Center de-designated areas LB-1, LB-2, and
7 LE. As the Court stated there:

8 Moreover, the County's overtly heavy reliance on economic factors when
9 deciding whether land has long-term agricultural commercial significance
10 runs afoul of several of the GMA's planning goals – namely, the County's
11 duty to "designate and conserve agricultural lands." *Soccer Fields*, 142
12 Wn.2d at 558 (analyzing the GMA's "[n]atural resource industries" planning
13 goal – RCW 36.70A.020(8)). In addition, the County's emphasis on economic
14 factors violates RCW 36.70A.020(5), which requires counties to "[e]ncourage
15 economic development . . . within the capacities of the state's natural
16 resources, public services, and public facilities" (emphasis added).⁸⁵

17 Conclusion

18 Having considered the Briefs of the parties, oral argument, and having reviewed the
19 entire record, and based on the discussion and findings above, the Board concludes the
20 action of Clark County in de-designating Area WB was clearly erroneous in view of the
21 entire record before the Board and in light of the goals and requirements of chapter 36.70A
22 RCW. The Board concludes the County committed clear error in its analysis of the *Lewis*
23 *County* test's third prong, that prong focusing on the long-term commercial significance of
24 agricultural land. The Board finds and concludes the de-designation of Area WB failed to
25 comply with RCW 36.70A.020(8) and RCW 36.70A.170.

27 VANCOUVER VA AND VANCOUVER VA-2

28 In remanding this matter to the Board, the Court of Appeals stated:

29 In effect, the County argues that the Growth Board erred when reviewing the
30 County's assessment of the first *Lewis County* prong. We agree and remand
31
32

⁸⁴ Ex. 6605, *20-Year Comprehensive Growth Management Plan 2004-2024*, Issue Paper # 7, p. 4.

⁸⁵ *Clark County v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn. App. at 243.

1 to the Growth Board for reconsideration of its decision on parcels VA and
2 VA-2.⁸⁶

3 In addition, the Court stated:

4 These parcels' relative proximity to all the development occurring in both
5 UGAs, but particularly the Vancouver UGA, belies the Growth Board's
6 conclusion that the VA and VA-2 parcels are not characterized by urban
7 growth. It appears that the Growth Board's determination that the County
8 committed clear error in the de-designation of these parcels was based on an
9 error in the Growth Board's application of the statutory definition of
10 "characterized by urban growth" in the first *Lewis County* prong. Accordingly,
11 we remand to the Growth Board its decisions regarding parcels VA and VA-2
12 for further consideration.⁸⁷

13 The parties disagree on the appropriate interpretation of the Court's remand directive.
14 The County and Intervenors suggest the court has decided the question of whether Areas
15 VA and VA-2 are "characterized by urban growth" while Petitioners argue the question was
16 returned to the Board for "reconsideration" or "further consideration." However, the fact all
17 the parties briefed and argued the issue of whether Areas VA and VA-2 were "characterized
18 by urban growth" illustrates they were unsure of the Court's intent.

19 Based on the Board's review of the Court's decision, it concludes the matter has
20 been decided: Areas VA and VA-2 have been determined by the Court of Appeals to be
21 "characterized by urban growth," the *Lewis County* first prong. The Board bases that
22 determination, in part, on the Court's use of the words "belies the Growth Board's
23 conclusion."⁸⁸ The Court also employed the word "belies" in discussion of the de-
24 designation of Areas LB-1, LB-2, and LE. "All the evidence in the County's matrix belies a
25 conclusion that parcels LB-1, LB-2, and LE are characterized by urban growth." The Court
26 followed that observation with a statement that the Board correctly concluded the County
27 erred in assessing the urban growth characteristics of the LaCenter parcels.⁸⁹ There is little
28
29
30

31 ⁸⁶ *Id.* at 246.

32 ⁸⁷ *Id.* at 247.

⁸⁸ Oxford Dictionary (American English) (US): fail to fulfill or justify (a claim or expectation); betray;
http://www.oxforddictionaries.com/us/definition/american_english/belie.

⁸⁹ *Clark County v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn. App. at 247.

1 room to argue use of the word “belies” in the contexts employed by the Court leads to any
2 other result.

3 An additional factor supporting the Board’s conclusion that the issue has been
4 decided is the Court’s decision to not consider other arguments challenging the Board’s
5 conclusions. “Because we remand on these grounds, we need not consider other
6 arguments such as a challenge to finding of fact 33 regarding the adequacy of the Growth
7 Board’s evaluation of the WAC factors for the VA and VA-2 parcels.”⁹⁰
8

9 Having reached that conclusion however, in light of previous appellate decisions
10 directing the Board to consider all issues,⁹¹ the likelihood this matter may once again be
11 considered by the appellate courts, and the fact all parties briefed and argued the second
12 and third *Lewis County* prongs, the Board deems it appropriate to address them. As
13 enunciated by the *Lewis County* court, they are:
14

- 15 2. Whether the land is primarily devoted to the commercial production of
16 agricultural products enumerated in RCW 36.70A.030(2), including land
17 in areas used or capable of being used for production based on land
18 characteristics;⁹²
- 19 3. Whether the land has long-term commercial significance for agricultural
20 production, as indicated by soil, growing capacity, productivity, and
21 whether it is near population areas or vulnerable to more intense uses.
22 Counties may [in actuality, are “required to”] consider the development-
23 related factors enumerated in WAC 365-190-050(1)

24 **Prong 2:**

25 This Prong requires consideration of whether land is primarily devoted to the
26 commercial production of agricultural products, “including land in areas used or capable of
27 use in agricultural production based on land characteristics.” Land is so devoted if it is in an

28 ⁹⁰ *Id.*, n. 30: “Because we remand on these grounds, we need not consider other arguments such as a
29 challenge to finding of fact 33 regarding the adequacy of the Growth Board’s evaluation of the WAC factors for
30 the VA and VA-2 parcels.”

31 ⁹¹ See *Suquamish Tribe v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 156 Wn. App. at 778: Board
32 had failed to decide all the issues presented for review “based on an erroneous legal conclusion that leads [the
board] to either not decide or to inadequately decide an issue.”

⁹² See also *City of Redmond v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d at 53: We hold
land is ‘devoted to’ agricultural use under RCW 36.70A.030 if it is in an area where the land is actually used or
capable of being used for agricultural production.”

1 area used or capable of being used for agricultural production.⁹³ It is clear that both Areas
2 VA and VA-2 have soils suitable for agriculture. The Court of Appeals observation of the
3 Board's conclusion when addressing Prong 2 in regards to the La Center Areas (LB-1, LB-2,
4 and LE) provides guidance: "All areas are capable of being farmed." In that regard, a
5 comparison of the percentages of prime soils on the La Center areas with those on VA and
6 VA-2 is noteworthy:

7
8 VA-86%; VA-2-59%

9 LB-1-57%; LB-2-80%; LE-79%

10 The percentages of prime soils in the Vancouver areas exceed those in the La Center
11 areas.

12 Additionally, both VA and VA-2 are located within "areas used or capable of being
13 used" for agricultural production. Not only were these areas designated as ALLTCS less
14 than three years prior, additional lands to the southwest and northeast were so designated
15 with several hundreds of acres to the Northeast remaining as designated agricultural lands
16 following adoption of the Ordinance challenged in this matter. The areas are described on
17 the Matrix as being characterized by open fields, forested land, interspersed residences and
18 farm buildings (VA); open fields, rural residential, farm buildings (VA-2). Similarly, nearby
19 land uses are described for both areas as rural residential, open fields and forest land.⁹⁴

20
21 Holt Homes argues it has no intent nor does it currently use its portion of these areas
22 for agricultural production. Both Holt Homes and Birchwood Farms referred to the
23 Globalwise, Inc.⁹⁵ report which indicates there are no commercial farms within either of
24 these areas.⁹⁶ However, the Supreme Court addressed the issue of landowner intent in the
25 *City of Redmond* decision:

26
27 . . . there are compelling reasons against concluding the Legislature intended
28 current use or landowner intent to control the designation of natural resource
29 lands under the GMA. First, if current use were a criterion, GMA

30
31 ⁹³ *City of Redmond*, 136 Wn.2d at 53; and *Lewis County*, 157 Wn.2d at 502.

32 ⁹⁴ Ex. 6605, p. 5.

⁹⁵ Ex. 6548, *Analysis of the Agricultural Economic Trends and Conditions in Clark County, Washington*, April 16, 2007.

⁹⁶ Intervenor Holt Homes, Inc.'s Hearing Brief at 10; Intervenor-Respondent Birchwood Farms, LLC's Respondent's Brief at 10.

comprehensive plans would not be plans at all, but mere inventories of current land use. The GMA goal of maintaining and enhancing natural resource lands would have no force; it would be subordinate to each individual landowner's current use of the land.

. . . if landowner intent were the controlling factor, local jurisdictions would be powerless to preserve natural resource lands. Presumably, in the case of agricultural land, it will always be financially more lucrative to develop such land for uses more intense than agriculture.⁹⁷

The Board finds and concludes Areas VA and VA-2 constitute land in areas used or capable of being used for agricultural production based on land characteristics.

Prong 3:

Growing Capacity, Productivity, Soil Composition

Eighty-six percent of Area VA has prime agricultural soil while VA-2 has 59%. Prime farmland is described by the Code of Federal Regulations as "land that has the best combination of physical and chemical characteristics for producing food, feed, forage, fiber, and oilseed crops. . . . It has the soil quality, growing season, and moisture supply needed to economically produce sustained high yields of crops. . . ."⁹⁸

While the County and Intervenor argue physical constraints affect both areas, they acknowledge these areas have high quality farm soils.⁹⁹ Physical constraints, such as the presence of wetlands referenced by Intervenor, existed when these areas were first designated as ALLTCS and, furthermore, would not affect use of the areas as agricultural land.

VA and VA-2 – WAC Factors

a. The availability of public facilities:

Public facilities are defined by RCW 36.70A.030(12) and WAC 365-190-030(16) as including streets, roads, highways, sidewalks, street and road lighting systems, traffic

⁹⁷ *City of Redmond v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d at 52.

⁹⁸ 7 CFR Ch. VI Part 657, Section 657.5 (a).

⁹⁹ Clark County's Brief on Remand at 8; Intervenor Holt Homes, Inc.'s Hearing Brief at 10; Intervenor-Respondent Birchwood Farms, LLC's Respondent's Brief at 11.

1 signals, domestic water systems, storm and sanitary sewer systems, parks and recreational
2 facilities, and schools. A map shows a water line at the southern edge of Area VA, however
3 it does not appear there is any public water service provided to VA.¹⁰⁰ Nor does the map
4 indicate any water lines near Area VA-2. There are no sewer lines near either area. NE
5 179th abuts the southern edge of Area VA and NE 50th lies along the eastern boundary of
6 both areas. NE 179th abutting VA is a two-lane principal arterial while NE 50th abutting VA-2
7 is a two-lane rural minor collector with shoulders.¹⁰¹ The Matrix mentions no other public
8 facilities in the area.
9

10 Birchwood Farms points to information in the Record that water and sewer service
11 can be made available to these areas.¹⁰² Both Birchwood Farms and Holt Homes also
12 argue the County has plans to improve the adjacent roads although no timeline for such
13 work appears in the Record.
14

15 The information addressing the availability of utility services as well as future road
16 improvements appears to be speculative. It is clear that at the time of the County's decision
17 to de-designate these areas, the only public facilities were the water lines adjacent to VA,
18 NE 179th and NE 50th.
19

20 **b. Tax status:**

21 Forty percent of the land in VA is enrolled in the current use taxation program
22 (chapter 84.34 RCW) while none of the land in VA-2 is so enrolled. Some agricultural
23 production is required to qualify and remain in the current use agricultural taxation program
24 of chapter 84.34 RCW. See RCW 84.34.020(2).
25
26

27 **c. The availability of public services:**

28 Public services are defined by RCW 36.70A.030(13) and WAC 365-190-030(17) as
29 including fire protection and suppression, law enforcement, public health, education,
30 recreation, environmental protection, and other governmental services. Any such services
31
32

¹⁰⁰ Ex. 6605, Map titled *Comprehensive Growth Management Plan NW Vancouver UGA –Map 1*.

¹⁰¹ Ex. B attached to Intervenor Holt Homes' Hearing Brief.

¹⁰² Ex. 5306, letter from Olson Engineering, Inc. dated October 26, 2005.

1 would be provided to Areas VA and VA-2 by Clark County as the areas are within the
2 unincorporated portion of the County. The Matrix makes no specific reference to any public
3 services/facilities in the area (with the exception of the water line bordering VA). Clark
4 County asserts there is a school within two miles of VA-2 and it references the water line
5 adjacent to VA, at a distance of one-half mile.¹⁰³
6

7 **d. Relation or proximity to urban growth areas:**

8 Areas VA and VA-2 are adjacent to each other with the latter lying to the north. Prior
9 to the expansion of the UGA boundary in 2007, these areas were a significant but
10 indeterminable distance (based on the Record) from the nearest boundary of the Vancouver
11 UGA and approximately two miles from the Battle Ground UGA. The city limits of Vancouver
12 and Battle Ground lie beyond the UGA boundaries.
13

14 Birchwood Farms and Holt Homes point to a Washington State University facility and
15 Legacy Hospital, describing them as “nearby;” and Holt argues the area surrounding VA is
16 “intensely urbanizing.”¹⁰⁴ The Petitioners estimate the WSU facility is nearly one mile from
17 Area VA while Legacy Hospital is estimated to be more than two miles.¹⁰⁵ Those distances
18 were not refuted although Intervenor argued at the Hearing on the Merits that the northern
19 boundary of the WSU real property was much nearer.
20

21 **e. Predominant parcel size:**

22 Area VA totals 125 acres.¹⁰⁶ Nearly all of that acreage is owned by Intervenor Holt
23 Homes and Birchwood Farms.¹⁰⁷ The four parcels in Area VA vary from 11 to 75 acres.¹⁰⁸
24 The median parcel size is 31.25 acres. VA-2 is 23 acres made up of three parcels ranging in
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30 ¹⁰³ Clark County's Brief on Remand at 8.

31 ¹⁰⁴ Intervenor Holt Homes, Inc.'s Hearing Brief at 13; Intervenor-Respondent Birchwood Farms, LLC's
Respondent's Brief at 13.

32 ¹⁰⁵ Petitioners' Reply Brief at 17.

¹⁰⁶ Ex. 6605, p. 7.

¹⁰⁷ Ex. 246, p. 1 and Ex. 250, p. 2.

¹⁰⁸ Ex. 6605, p. 7.

size from approximately 1 to 18 acres. Clark County's farms averaged 44 acres in 2002 and there were 471 farms of between one and nine acres located in the County that year.¹⁰⁹

f. Land use settlement patterns and compatibility with agricultural practices:

As set forth above, the land uses of the area surrounding both VA and VA-2 consist of rural residential, open fields, and forested land.¹¹⁰ There is no evidence in the Record that indicates concerns regarding compatibility with agricultural practices.

g. Intensity of nearby land uses:

The surrounding development is of low intensity (rural residential, open fields, and forested land¹¹¹) including land designated as ALLTCS.¹¹² The nearest more intense development includes the aforementioned WSU facility, a subdivision to the Southwest, and a freeway interchange to the West. None of those could be characterized as "nearby" although actual distances cannot be discerned from the Record. The aerial photographs of the Northwest Vancouver area included with Exhibit 6634A provide the best information in that regard.

h. History of land development permits issued nearby:

Urban development in the area did not exist according to the Matrix: "No urban development permits in process within the vicinity" of the two subareas.¹¹³

i. Land values under alternative uses:

Land values would clearly be higher if taken out of agriculture, rezoned, and added to the Vancouver UGA. See discussion of this factor in the Board's analysis of Area WB.

¹⁰⁹ Ex. 6634, *2002 Census of Agriculture, Washington State and County Data*, Volume 1, Geographic Area Series, Part 47 (June, 2004), p. 238.

¹¹⁰ Ex. 6605, p. 7.

¹¹¹ Ex. 6605, Attachment A: July 5, 2007, and August 14, 2007, BOCC Tentative Land Use Map Agricultural Analysis Deliberation and Decision, p. 5 (10/9/2007).

¹¹² Ex. 6605, Map entitled *NW Vancouver UGA-Map1*.

¹¹³ Ex. 6605, p. 7.

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- 1 1. The Petitioners are unable to meet their burden of proof to establish violations
2 involving Areas VA and VA-2 as that question was addressed and resolved by the
3 decision of the Court of Appeals;
- 4 2. The Petitioners have met their burden of proof to establish Clark County failed to
5 comply with 36.70A.050(3) and 36.70A.170(1) & (2) in de-designating Area WB.
6 Because that decision was not adopted in compliance with the GMA, the portion of
7 Clark County Ordinance 2007-09-13 de-designating Area WB was clearly erroneous
8 in view of the entire record before the Board and in light of the goals and
9 requirements of the GMA;
- 10 3. The Board found and concluded in the Amended Final Decision and Order that the
11 action of Clark County in de-designating Area WB substantially interfered with RCW
12 36.70A.020(8) and invalidated that portion of Ordinance No. 2007-09-13 as it
13 pertained to Area WB.¹¹⁴ The Board affirms and continues that determination of
14 invalidity with this Order.
- 15 4. Findings and Conclusions in the June 3, 2008, Amended Final Decision and Order
16 addressing the question of whether Area WB had long term commercial significance
17 for agricultural production are supplemented as set forth in the body of this Order.
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21 Entered this 11th day of March, 2014.
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25 William Roehl, Board Member
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28 Nina Carter, Board Member
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31 Margaret Pageler, Board Member
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¹¹⁴ Amended Final Decision and Order, p. 72 (June 3, 2008).

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.5 ¹¹⁵

¹¹⁵ Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), -840. A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.